



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

August 4, 2003

Ms. Ashley D. Fourt  
Assistant District Attorney  
Tarrant County  
401 West Belknap  
Fort Worth, Texas 76196-0201

OR2003-5396

Dear Ms. Fourt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185307.

The Tarrant County Sheriff's Department (the "department") received a request for Internal Affairs Division report number 02-IAD-181, pertaining to the requestor's suspension. You state that some information has been released to the requestor. You claim, however, that the remainder of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, we note that the department requested a decision from this office in relation to another request for some of the same information at issue in the present request. We ruled on that request in Open Records Letter No. 2003-3498 (2003), issued May 23, 2003. To the extent the information at issue here is identical to the information at issue in Open Records Letter No. 2002-3498, the department may rely on that decision as a previous determination regarding the public availability of the information. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations). With respect to responsive information, the public availability of which was not addressed in Open Records Letter No. 2002-3498, we address your claimed exceptions to disclosure.

We note that the submitted records include information obtained during the course of a polygraph examination. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statutes outside of the Public Information Act (the "Act"). Section 1703.306 of the Occupations Code governs information obtained during the course of a polygraph examination and provides in pertinent part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee[.]

Here, the requestor is the examinee. Access to polygraph information is governed by section 1703.306 of the Occupations Code. *See* Occ. Code § 1703.306. Section 1703.306(a)(1) expressly provides the examinee with access to the information. Accordingly, the department must release the polygraph information in the submitted documents to the requestor.

Next, we note that the information at issue is subject to section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The information at issue consists of a completed investigation. Thus, the department must release the submitted information unless it is excepted under section 552.108 or confidential under other law. You contend that the information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege. The common-law informer's privilege is recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928); *see also Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege under *Roviario* exists to protect a governmental body's interest. Therefore, the common-law informer's privilege may be waived by a governmental body and

is not "other law" that makes the information confidential for purposes of section 552.022. Open Records Decision No. 549 at 6 (1990).

We note, however, that the informer's privilege is also found in rule 508 of the Texas Rules of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Rule 508 provides, in relevant part:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished, except the privilege shall not be allowed in criminal cases if the state objects.

Thus, an individual's identity is confidential under rule 508 if a governmental body demonstrates that the individual has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation, and the information does not fall within the purview of the exceptions to the privilege enumerated in rule 508(c). In this instance, the individuals whose identities you seek to withhold under the informer's privilege provided information to the department in connection with an administrative internal affairs investigation rather than an investigation of a possible violation of law. Therefore, the information at issue may not be withheld pursuant to Rule 508 of the Texas Rules of Evidence.

You also contend that the submitted investigation is excepted from disclosure under section 552.108. Section 552.108 of the Government Code provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution;

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

....

A governmental body that raises section 552.108 must reasonably explain, if the responsive information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision Nos. 562 at 10 (1990), 434 at 2-3 (1986).

You assert that “the requested information pertains to the identity and circumstances surrounding the use of a confidential informant that led to an IAD investigation of a [department] jailor.” We note, and you acknowledge, that information about complaints against peace officers generally may not be withheld under section 552.108. For example, the names of complainants, the names of the officers who are the subjects of complaints, an officer’s written response to a complaint, and the final disposition of a complaint generally are not excepted from disclosure by section 552.108. Open Records Decision Nos. 350 at 3 (1982), 342 at 2 (1982), 329 at 2 (1982). In certain cases, the identities of witnesses, informants, and persons interviewed in the course of a police internal investigation may be withheld under section 552.108 if the police department determines that disclosure either might subject these individuals to possible intimidation or harassment or might harm the prospects of future cooperation. Open Records Decision Nos. 329 at 2 (1982), 313 at 2-3 (1982), 297 at 2 (1981), 252 at 4 (1980). However, section 552.108 is inapplicable where a complaint against a law enforcement officer does not result in a criminal investigation or prosecution. *Morales v. Ellen*, 840 S.W.2d 519, 525-526 (Tex. App.—El Paso 1992, writ denied) (construing statutory predecessor); Open Records Decision No. 350 (1982) (stating that statutory predecessor was not applicable to internal affairs investigation file when no criminal charge against police officer results from investigation). In this case, the submitted information relates to an internal affairs investigation of violations of departmental policy, rather than to a criminal investigation. Investigations into non-criminal matters are not excepted from disclosure by section 552.108 of the Government Code. *Morales v. Ellen*, 840 S.W.2d at 526 (predecessor statute to section 552.108 not applicable where no criminal investigation resulted). Because the submitted information does not relate to a criminal

investigation, we find that the submitted information is not excepted from disclosure under section 552.108.

In summary, to the extent the information at issue is identical to the information at issue in Open Records Letter No. 2003-3498 (2003), the department must comply with the ruling in Open Records Letter No. 2003-3498 regarding the public availability of such information. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Dr. Saldivar", with a stylized flourish at the end.

David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 185307

Enc: Submitted documents

c: Mr. James A. Warren  
1305 Cameo  
Fort Worth, Texas 76134  
(w/o enclosures)